Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-941

EDGEWOOD HEALTH CARE CENTER, INC.,
DEFENDANT, PETITIONER,

v.

UNITED STATES OF AMERICA,
PLAINTIFF, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Edgewood Health Care Center, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on October 25, 1979.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit not yet reported is printed in Appendix A hereto, *infra,* page . The judgment of the United States Court of Appeals for the First Circuit is printed in Appendix B hereto, *infra,* page . The Judgment and Probation/Commitment Order of the United States District Court for New Hampshire is printed in Appendix C hereto, *infra,* page .

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit (Appendix B, *infra,* page) was entered on October 25, 1979. The jurisdiction of the Court is involved under Title 28, United States Code, section 1254(1).

Questions Presented

Whether the government prosecution has the affirmative duty to review all available governmental agency files which relate to or involve the Petitioner concerning the criminal charges brought by the United States Attorney when there is an indication that those files may include exculpatory evidence?

Statement of the Case

Petitioner Edgewood Health Care Center, Inc. is a corporation under the provisions of the business corporation law of the State of New Hampshire, whose principal place of business is Portsmouth, County of Rockingham and State of New Hampshire. It was organized and incorporated on September 21, 1971. The corporation operated and man-

aged a nursing home for the care of the aged. Edgewood Health Care Center, Inc. hired Glenn Pomerleau in April of 1972 to act as its Administrator.

Edgewood Health Care Center, Inc. filed with the Department of Health, Education and Welfare and with the State of New Hampshire Welfare Department an application for certification for participation in the Medicare program. The nursing home opened for business on June 13, 1972. The provider agreement for Medicare participation was signed by Mr. Pomerleau in July of 1972. The facility was designed in two wings containing a total of 100 beds. In the Medicare participation request, the facility asked that 50 beds in the west wing be certified for participation in the Medicare program. On October 17, 1972 the Department of Health, Education and Welfare certified the 50 beds in the west wing for Medicare participation. The certification for Medicare participation designated the west wing as a "distinct part facility", or skilled nursing facility. Mr. Pomerleau thereafter submitted an application to the State of New Hampshire Department of Welfare requesting that the nursing home be certified as a skilled nursing facility for Medicaid purposes, and again requested that 50 beds be certified in the west wing. This application was approved and 50 beds were certified for skilled nursing care as a distinct part facility under Medicaid. As of June 13, 1972 Edgewood Health Care Center was certified for 50 beds for participation as an extended care facility under the Health Insurance for the Aged Program (Title 18 of the Social Security Act). It was also certified for 50 beds as a skilled nursing care facility as a distinct part under Title 19 of the Social Security Act for Medical Assistance Program. Therefore, the entire facility contained 100 certified beds and in the west wing the 50 beds were certified both for Medicare and Medicaid as a skilled nursing facility.

The Medicare program is a federal program. It is administered by the United States Government Department of Health, Education and Welfare under Title 18 of the Social Security Act. Federal monies are raised by the Social Security payments and in this case, were dispensed by Blue Cross/Blue Shield of New Hampshire-Vermont as the intermediary. Under Medicaid the program was administered by the State of New Hampshire, Department of Welfare and is essentially a State run program being partly subsidized by the federal government. Under the Medicare program, in order to participate, two threshold criteria must be met. First, a person must be 65 years or older and second, in order to receive benefits under the Medicare program the individual must be located in a skilled nursing facility. Under the Medicaid program there is no age requirement and anyone who needs medical assistance is entitled to Medicaid benefits. There is another difference between the two programs, under the Medicaid program a patient could be either in a skilled nursing facility or in an intermediate care facility and the facility would still receive reimbursement at either of the two established rates. The Edgewood Health Care Center, Inc. contained an intermediate care facility in its east wing during the period under consideration.

Under the Medicaid program patients in skilled nursing facilities were entitled to $30.00 per day reimbursement while located in a skilled nursing facility. Under the Medicaid program a patient in intermediate care facility were entitled to $16.00 per day. Patients enrolled under the Medicare program had to be placed only in the skilled nursing facility to be reimbursed at $30.00 per day. There is no intermediate care rate under Medicare.

Under the Medicaid program placement of patients in the skilled nursing facility required prior approval by the

New Hampshire Division of Welfare and in this case Jean Donovan was the approving authority.

The indictment alleges that during the period of August, 1973 through April of 1975 Edgewood Health Care Center, Inc. billed under both the Medicare and Medicaid program for skilled nursing facility services when patients were not actually located in a skilled nursing facility bed. It alleged that the nursing home submitted bills claiming $30.00 a day reimbursement when patients were not actually in a skilled nursing facility bed. The actual charge is violation of the mail fraud statutes under Title 18, Section 1341 and Section 2. The charge is founded upon submitted bills and receiving payment through the U.S. mails in furtherance of a scheme involving these activities alleged. In June of 1974 Jean Donovan visited the Edgewood Manor Nursing Home and discovered that patients who were authorized to be placed in a skilled nursing facility were, according to the records, actually located in the east wing, an intermediate care facility. Further, that the patients located in the east wing were being billed out at a rate of $30.00 per day for skilled nursing facility rates. As a result of her visit, she wrote a letter on June 11, 1974 to Glenn Pomerleau informing him of the errors that were being committed by Edgewood Health Care Center. In September of 1974 the Blue Cross/Blue Shield New Hampshire-Vermont office notified the United States Department of Health, Education and Welfare that they had discovered during routine review that Medicare patients had been put into a non-certified non-medicare certified part of the facility at Edgewood Health Care Center. An audit was completed and that the original information was still correct as far as they were concerned. On May 5, 1975 John Raeke, a program integrity specialist for the Department of Health, Education and Welfare, visited Edgewood Health Care Center to investigate the status of the records

concerning Medicare billing procedures. The situation as determined by John Raeke was discussed with the Administrator, Glenn Pomerleau, on May 5. On June 17, 1975 Mr. Raeke conducted a subsequent visit to Edgewood Health Care Center and further records were reviewed by the investigator as part of the investigation. Finally on August 8, 1975 an interview was conducted with the Administrator and other officials involved with the Edgewood Health Care Center. Discrepancies discovered by the investigator were discussed with all parties present. A final meeting was held with the representatives of Edgewood Health Care Center on September 15, 1975 to discuss the status of the investigation. Subsequent to that, in September 1975 an investigation report was prepared and furnished to the United States Attorney. A grand jury was convened for this matter in the summer of 1976 but no indictment was returned. United States Attorney William Deachman declined further prosecution in this matter at that time.

The U.S. Department of Health, Education and Welfare continued along with the New Hampshire Department of Welfare to investigate these matters. The New Hampshire Department of Welfare submitted to Calvin Smith, the United States Postal Inspector, evidence of the supposed scheme in this matter. On or about September 27, 1977 Calvin Smith, a U.S. Postal Inspector, received information from the investigators in this matter concerning allegations of a scheme to defraud the State of New Hampshire. As a result of this information, Mr. Smith swore out an affidavit for a search warrant to search Edgewood Health Care Center for records involving Medicare and Medicaid. On January 16, 1978 Calvin Smith, along with several other investigators and a U.S. Marshal, conducted a search and seizure at Edgewood Health Care Center, Inc. in Portsmouth, New Hampshire. Several large cartons containing

numerous documents were taken from the administration office of Edgewood Health Care Center. These documents and papers were taken to the U.S. Postal office in Manchester, New Hampshire. They remained there from January 16, 1978 until May of 1978 while the investigators examined the papers. A selective process was used in determining which papers were to be brought to the attention of the United States Attorney. Only those papers delivered to the United States Attorney by Calvin Smith were seen and utilized by the United States Attorney in this investigation. Those documents and records which were offered into evidence came out of that portion of the records which were submitted to the United States Attorney by the investigators employed in this process. The criteria which the investigators used for omitting documents from the list of documents to be introduced in evidence was based upon whether those documents proved the case. As a result of the information turned over to the United States Attorney, a grand jury was convened by the U.S. Attorney in July of 1978. Evidence and witnesses were presented to the grand jury and on July 20, 1978 at 41-count indictment was returned against the Defendants, Glenn Pomerleau and Edgewood Health Care Center, Inc. Many of the documents that were involved included nurses notes and records, fine reports, diet control, etc. The substance of the indictment involved postal fraud for submitting bills and receiving payment through the mails for activities committed under the Medicare and Medicaid provisions of the Social Security Act.

During the pre-trial phase of this matter an Omnibus Hearing was conducted whereby full discovery was granted in this matter. The government was required to submit a list of its witnesses and their Jenck's Act material concerning statements made by a non-witness to witnesses that the government intended to rely on for proof of its case.

The government was required also to file lists of exhibits and provide copies of exhibits to Defendants by August 21, 1978 and Defendants were required to file objections prior to September 1, 1978. A Motion for Bill of Particulars was filed by Defendants and answered by the U.S. Attorney as required. As part of the discovery process, the U.S. Attorney informed counsel for Defendants that because the case involved such a large amount of paperwork and because it was felt that the case was simple and straightforward the government would be willing to provide for the Defendants' inspection and copying every document that the U.S. Attorney had in his possession with exception of certain documents. It should also be considered that the documents given to the U.S. Attorney by the investigators and selected by the investigators did not include additional documents retained in other government files associated with Edgewood Health Care Center, Inc. This would include the Social Security Administration files, Blue Cross/Blue Shield of New Hampshire-Vermont files, the New Hampshire Department of Health and Welfare, etc. The U.S. Attorney forwarded to the Defendants on August 24 those exhibits selected for the case. During the pre-trial period there continued to be general cooperation between the prosecution and defense counsel in supplying exhibits and lists of witnesses to each other. There was no affirmation made by the U.S. Attorney that all applicable files had been checked and that no other exculpatory material under *"Brady"* was discovered. The United States Attorney put on 16 witnesses and introduced over 400 documents as part of his case. Pursuant to this appeal, one witness in particular stands out as requiring designation of facts.

Counsel for Petitioner moved for a judgment of acquittal and for a mistrial at the close of the government's evidence. The defense presented no witnesses of its own and

rested. The trial Judge denied both of these motions. The charges were presented to the jury and on September 28, 1978 they returned a guilty verdict for all 24 counts of the indictment.

Petitioner appealed the verdict to the United States Court of Appeals for the First Circuit on November 14, 1978. That Court heard arguments by both parties and on October 25, 1979 affirmed the judgment of the District Court. The basis for jurisdiction in the United States Supreme Court in this matter rests in Title 28, United States Code, Section 1254 which reads that: "Cases in the courts of appeals may be reviewed by the Supreme Court . . . by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment."

Petitioner here was a party to a criminal case heard in the United States Court of Appeals for the First Circuit.

Reasons for Granting the Writ

The government may have an affirmative obligation to investigate, develop or collect exculpatory evidence, where the defendant cannot. The defendant cannot use all the government facilities nor have complete access to the records and files maintained relative to defendant or its operation. There is here a greater burden on the U.S. Attorney than one which merely required the prosecutor to open his files for inspection and copying. The resources of Petitioner would have been completely exhausted and misdirected if it had attempted to review every file in each agency for information relevant to this case. The prosecutor in this matter had available the resources of government investigators from several agencies plus his own personnel who could have reviewed all applicable files and made the determination that there was no exculpatory

material available. This review could have been under guidelines established by the U.S. Attorney as to what "exculpatory" might be in this matter.

When this process was completed an affirmation by the U.S. Attorney could have been made to the petitioner and to the trial court that all exculpatory material had been provided that exists.

Some exculpatory material was provided by the prosecution which petitioner and its counsel had not been aware of. This provision of material established the possibility and likelihood that additional exculpatory material may exist in government agency files when no affirmation has been made otherwise by the U.S. Attorney.

The investigation of the petitioner had continued for several years and those involved had ample opportunity to review all available files. The petitioner is not asking that a totally unreasonable burden be placed on the prosecutor in this matter. Considering the facts of this case, the burden on the prosecution would surely extend to the point where there must be an equalization of the imbalance of the available investigative resources and preparation time.

The prosecutor in this matter was directed by the district court to provide any and all exculpatory material as part of the discovery order. In light of his specialized knowledge of the case and the resources available to him, he must assume the enforcement function and it is the prosecutor himself who must direct the search of the files in pursuit of discoverable material. This duty is mandated by the fairness requirement of the due process clause and is consistent with his general obligation to seek justice above victory.

Conclusion

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 78-1561

UNITED STATES OF AMERICA,

APPELLEE,

v.

EDGEWOOD HEALTH CARE CENTER, INC.,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. SHANE DEVINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
KUNZIG,* *Judge, U.S. Court of Claims*,
and CAMPBELL, *Circuit Judge*.

Craig F. Evans, with whom *Joseph Michael*, and *Michael, Jones & Wensley*, were on brief, for appellant.

Steven M. Gordon, Assistant United States Attorney, with whom *William H. Shaheen*, United States Attorney, was on brief, for appellee.

October 25, 1979

CAMPBELL, *Circuit Judge*. This appeal taken by Edgewood Health Care Center, Inc. (Edgewood) is from its conviction on multiple counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 2. Edgewood, a nursing home, and Glen V. Pomerleau, its administrator, were jointly charged, tried by jury, and convicted, for having participated in a scheme to obtain excessive Medicare-Medicaid reimbursements. The scheme, in essence, included Edgewood's mis-

* Sitting by designation.

representations that certain of its patients were housed in the West Wing, a certified Skilled Nursing Facility, when in fact they were maintained in the East Wing, an Intermediate Care Facility. Since allowable reimbursement for East Wing patients was non-existent under the Medicare program and at a considerably lower rate under the Medicaid program, Edgewood illegally benefited as a result of its misrepresentations.

Edgewood presents two arguments on appeal, neither of which we find to have any substance. It first contends that the district court erred in denying a defense motion for mistrial based on the alleged prejudice caused by a government witness, a handwriting expert, who identified defendant Pomerleau's handwriting on a document later refused admittance into evidence because confusing and irrelevant. Edgewood argues that the expert's identification of Pomerleau's handwriting coupled with impressive reference to his own expertise and a handwriting comparison chart, somehow prejudiced the jury against it.

The short answer to this contention is that the defense did not register a timely objection to the expert's testimony nor, after the document itself was refused admittance into evidence, did the defense move to strike the testimony or for curative instructions. The motion for mistrial came only later, after the fact. We have said that only the most palpable of errors will be noticed on appeal when no objection has been raised below. *Stack* v. *United States*, 368 F.2d 788, 790 (1st Cir. 1966). *See* Fed. R. Crim. P. 51 and 52. Given the very substantial evidence indicating that Edgewood submitted improper Medicare-Medicaid charges and that this was done knowingly by the personnel responsible for Edgewood's affairs, we do not believe that the expert's testimony was substantially prejudicial nor, indeed, that the conduct of the trial by the district judge left anything to be desired in the circumstances. A motion for

mistrial is addressed to the sound discretion of the district court. *United States* v. *Sclamo,* 578 F.2d 888, 891 (1st Cir. 1978). There was no abuse here.

Edgewood makes a second argument based upon a supposed affirmative duty of the government to have reviewed all possibly relevant records in the possession of agencies involved in the present investigation and, thereafter, to have reported to appellant concerning the existence of possible exculpatory evidence. The organizations in question include the United States Department of Health, Education and Welfare, the New Hampshire Department of Health and Welfare, and the Vermont-New Hampshire office of Blue Cross/Blue Shield. No sufficient request for such review was ever made before or during trial, and Edgewood concedes that the prosecution did not violate specific anti-withholding requirements.[1] It appears, indeed, that the United States Attorney cooperated to give defendants access to the voluminous materials in his possession,

[1] *See Brady* v. *Maryland*, 373 U.S. 83 (1963), holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment; the Jenck's Act, 18 U.S.C. § 3500, requiring the court upon motion after a witness has testified for the United States to order the government to produce any statement of the witness in the possession of the United States relating to the subject matter of the witness' testimony; Fed. R. Crim. P. 16(a)(1)(C) requiring the government to permit the defendant to inspect and copy papers and documents in the possession, custody or control of the government, material to the preparation of the defense or intended for use by the government in its case in chief.

Appellant contends that the Postal Inspector who originally seized certain documents involved in the present case only presented the U.S. Attorney with those documents "which [he] felt proved the case." Appellant omits to state that before trial the Postal Inspector returned to the defendants all the seized papers not given to the U.S. Attorney; there is nothing whatever to suggest that documents useful to the defense were hidden from it. From the documents he retained, the U.S. Attorney not only provided defendants with several items that were helpful to them, but made the remainder available for their inspection.

and that agency records were accessible to the defense, or would have been made so upon proper request. Nonetheless, Edgewood puts forward the expansive proposition that the prosecution was obliged, on its own initiative, to search all official or semi-official files and materials in any way related to appellant or this action for exculpatory information which, in appellant's words, "may or may not have existed." Appellant argues that its resources would have been exhausted and misdirected had it attempted to review these same materials. We are asked to rectify what is said to be an inequality in available investigative resources and time for preparation.

Edgewood has cited, and we have found, no authority for placing such a duty on the government in these circumstances. The cases relied upon by appellant involve a prosecutor's willful refusal or negligent failure to disclose particular information vital to the defense. Here there is no suggestion of such misbehavior, nor of bad faith, nor of any attempt to suppress information useful to the defense. Appellant points to no exculpatory evidence that the prosecution failed to disclose or which an adequate investigation might have revealed. Appellant simply insists that the supposedly vast resources and the large number of trained personnel available to the prosecutor should have been utilized for Edgewood's benefit to facilitate a review of all possibly relevant records held by government or government-regulated agencies. This position goes well beyond any requirements of the law.

The judgment of the district court is affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 78-1561.

UNITED STATES OF AMERICA,

APPELLEE,

v.

EDGEWOOD HEALTH CARE CENTER, INC.,

DEFENDANT, APPELLANT.

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

[cc. MESSRS. JONES, MORAN and GORDON.]

APPENDIX C

UNITED STATES DISTRICT COURT
FOR NEW HAMPSHIRE

Docket No. CR. 78-00027-02

UNITED STATES OF AMERICA

v.

EDGEWOOD HEALTH CARE CENTER, INC.,

DEFENDANT.

JUDGMENT AND
PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person this date, November 6, 1978, with Counsel Joseph Michael, Esq.

There being a finding/verdict of Guilty on Counts I–XXVI, entered September 28, 1978.

Defendant has been convicted as charged of the offense(s) of Frauds and Swindles, a violation of Title 18, United States Code, Section 1341.

COUNTS I through XXIV:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is ordered to pay a fine for each count in the amount of $1,000 under the supervision of and according to the terms established by the U.S. Probation Office totaling $24,000.

CT OF NEW HAMP.
FILED
Nov 6 1978

(s) SHANE DEVINE, *U.S. District Judge*

Date: 11/6/78